

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

DURRIEL E. GILLAUM,

Defendant.

ORDER

05-C-0639-C
02-CR-0021-C

Defendant Durriel E. Gillaum has filed a motion to file an untimely certificate of appealability, together with a request for a certificate of appealability from the judgment entered in this case on December 28, 2005, denying his § 2255 motion. Because a request for a certificate of appealability is accompanied ordinarily by a notice of appeal, I construe defendant's submission to include an untimely notice of appeal from the December 28, 2005 judgment, and a motion for an extension of time in which to file the untimely notice. Defendant's motion also includes a request that he be allowed until March 28, 2006, in which to supplement his request for a certificate of appealability with a brief.

A district court may extend the time for filing a notice of appeal upon motion filed

no later than 30 days after the expiration of the time prescribed by Fed. R. App. P. 4 and upon the movant's showing of excusable neglect or good cause. Defendant filed his motion on March 20, 2006, which is within the 30 day period following expiration of the 60-day period he had in which to file a notice of appeal. He explains that his failure to file a timely notice of appeal and request for a certificate of appealability was the result of his illiteracy and reliance on the assistance of an “administrative law clerk” with whom he has been unable to communicate. Although the excuse is not a strong one, I conclude that it is sufficient to find good cause for defendant’s missing the deadline for filing his notice of appeal. Therefore, I will grant his request for an extension of time to file the notice of appeal and certificate of appealability.

However, I will deny defendant’s request for additional time within which to file a brief supporting his request for a certificate of appealability. Defendant’s motion already includes six pages of legal argument. There is little that defendant could state in a subsequent memorandum that would assist the court in deciding his motion. Therefore, the motion for additional time to file a brief will be denied.

As noted above, I have construed defendant’s submission to include a notice of appeal. However, defendant has not paid the \$255 fee for filing an appeal. 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22. Therefore, I construe defendant’s motion as including a request for leave to proceed in forma pauperis on appeal pursuant to 28 U.S.C. § 1915.

According to 28 U.S.C. § 1915(a), a defendant who is found eligible for court-appointed counsel in the district court proceedings may proceed on appeal in forma pauperis without further authorization “unless the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed.” Defendant had appointed counsel during the criminal proceedings against him and I do not intend to certify that the appeal is not taken in good faith. Defendant’s challenge to his sentence is not wholly frivolous. A reasonable person could suppose that it has some merit. Lee v. Clinton, 209 F.3d 1025, 1026 (7th Cir. 2000). However, I cannot grant defendant’s motion for a certificate of appealability. Such a certificate shall issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” § 2253(c)(2). Before issuing a certificate of appealability, a district court must find that the issues the applicant wishes to raise are ones that “are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.” Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983). “[T]he standard governing the issuance of a certificate of appealability is not the same as the standard for determining whether an appeal is in good faith. It is more demanding.” Walker v. O’Brien, 216 F.3d 626, 631 (7th Cir. 2000).

None of defendant's challenges to his sentence meet the demanding standard for a certificate of appealability. As I explained in the order entered on December 27, 2005, there

is no merit to any of defendant's claims alleging ineffective assistance of counsel, constitutionality of the sentencing guidelines and prosecutorial misconduct as to evidence introduced at trial.

The issues defendant seeks to raise on appeal are not debatable among reasonable jurists, no court would resolve the issues differently and the questions are not adequate to deserve encouragement to proceed further. Therefore, I decline to issue a certificate of appealability.

ORDER

IT IS ORDERED that defendant Durriel Gillaum's request for leave to file an untimely motion for a certificate of appealability and notice of appeal are GRANTED; his request for leave to proceed in forma pauperis on appeal is GRANTED; however, his request for a certificate of appealability and for an extension of time in which to file a memorandum in support of his request for a certificate of appealability are DENIED.

Entered this 28th day of March, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge